86-1420

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1986.

No.

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

RUSSELL M. LAHTI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

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9 pp

ISSUE PRESENTED.

Whether a victims' voluntary testimony must be suppressed where police become aware of the victims identity through a defendant's statements later held to have been involuntarily obtained by police.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL AND STATUTORY PROVISIONS.

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OPINION BELOW.

The opinion of this court below (App. A) is reported at 398 Mass. 829 (1986); ___N.E.2d___.

JURISDICTION

The decision of the court below was entered on December 18, 1986. An order was entered enlarging the time for

filing the petition until February 27, 1981 (Brenna, J., A. 582). The jurisdiction of this court is invoked under 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISIONS INVOKED.

FIFTH AMENDMENT.

"No person...shall be compelled in any criminal case to be a witness against himself."

STATEMENT OF THE CASE.

In June, 1985 the respondent, Russell M. Lahti was charged, by a Norfolk County grand jury with rape of a

child and indecent assault and battery upon a child under fourteen years of age. Prior to trial the defendant filed a motion to suppress his statements given to police. The motion was allowed. The Commonwealth did not request leave to appeal. Subsequently, the defendant filed a further motion to suppress the testimony of the two children named in the indictments. After hearing, the motion was allowed on January 22, 1986 (App. B).

The Commonwealth applied for leave to appeal that order pursuant to Mass. R. Crim. P.15. Leave to appeal was allowed and the matter referred to the full court for determination. A decision affirming the suppression order was rendered on December 18, 1986. Commonwealth v. Lahti, 398 Mass. 829 (1986). (App. A).

STATEMENT OF FACTS

On March 22, 1985, the defendant, Russell Lahti was called into the Quincy, Massachusetts police station to discuss an incident of child sexual abuse of his girlfriend's daughter, Miriam. This assault came to police attention in the course of a care and protection hearing brought by the Department of Social Services. The defendant was given his Miranda rights and indicated he wished to speak to the police. He was also advised that if he cooperated with the investigation, waiving his rights to have an attorney present and against self-incrimination his statements would not be used as a basis for criminal charges. Moreover, he was told that if he cooperated, he would be recommended for a special

program for diversion and treatment of sexual offenders. (The director of the program was present at the interview.) He acknowledged his sexual abuse of Miriam. The defendant was further informed that the District Attorney would make the ultimate trial decision and that if it were later discovered that he had had other sexual experiences with children, which he had failed to admit, he could be expelled from the program and prosecuted. The defendant then admitted to having fondled the two children, who are the subject of the instant case. The children were friends of Miriam and had slept over at his girlfriend's house on several occasions. The defendant then left the station. The following day he contacted Detective Patricia Nagrelli by telephone and described in greater detail his

sexual acts with the other two children, Kimberly and David.[1/]

Later that day the defendants' girlfriend telephoned her friend, the mother of Kimberly and David and told her the defendant Lahti had been sexually involved with her children. The mother then called the police and was told that the defendant had made a statement indicating that he had been involved in sexual misconduct with her children. The police cautioned the mother to use care in talking with the children.

The mother then questioned the children separately. She did not tell

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1/ As noted above, both of defendants' statements (at the police station and over the telephone) were ordered suppressed because of police promises of leniency. (See App. B). The District Attorney did not appeal this order.

the children that the defendant had admitted touching them. Both children described the sexual acts performed on them by the defendant. Both children wanted to testify and went to the police with their mother who also indicated a willingness for them to testify.

The trial court ordered that the childrens' testimony must be suppressed as "fruit of the poisoness tree" in order, primarily, to deter future misconduct in the negligent manner in which the Sexual Diversion Program was carried out. See Findings and Ruling (10-13). (App. C).

REASONS FOR GRANTING THE WRIT.

I. THE DECISION BELOW, REQUIRING EXCLUSION OF TESTIMONY OF VICTIMS WHOSE IDENTITY WAS DISCOVERED THROUGH STATEMENTS OBTAINED IN VIOLATION OF THE FIFTH AMENDMENT IS IN CONFLICT WITH DECISIONS OF THIS COURT.

A. The Court Below Has Applied The Wrong Analysis To Determine The Admissibility of Derivative Evidence Following A Fifth Amendment Violation.

The court below ruled that the victims testimony must be suppressed as the fruit or indirect product of the illegally obtained statements under the rule of Wong Sun v. United States, 371 U.S. 471 (1963). They reached this result by applying the attenuation analysis of United States v. Ceccolini, 435 U.S. 268 (1978) which involved the testimony of a witness who was discovered as a result of an illegal search, a Fourth Amendment violation. While the Wong Sun doctrine has been applied to Fifth Amendment violations, the attenuation analysis applied by the court below has not. In fact application of such analysis is in

direct conflict with cases decided by this Court holding that the "independent source" doctrine is applicable in the Fifth Amendment context. Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 79 (1964); Kastigar v. United States, 406 U.S. 441, 460.

The proper question under the independent source doctrine is whether the evidence has been come at by exploitation of the primary illegality or whether the disputed evidence had an independent, legitimate source. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). As explained by this court in Nix v. Williams, 467 U.S. 431, 443 (1984):

> "The independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly

> balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred." (Footnote omitted).

However, the court below, postulating that the police interrogation was a purposeful attempt to discover the defendant's crimes and witnesses to them, held simply that deterrence concerns compel application of the exclusionary rule. Such an analysis swallows the independent source exception. Speculation as to why the police committed the original illegal act is totally irrelevant to the question of whether derivative evidence has been come at by exploitation of that illegality. Whether the police acted deliberately or negligently, in good faith or bad in conducting the initial interview is simply not a requirement in

determining admissibility of derivative evidence. Nix v. Williams, at 441-445.

Moreover, the traditional rationale for suppression of statements compelled in violation of the Fifth Amendment is their inherent unreliability or untrustworthiness not deterrence of police misconduct. The Fifth Amendment goal of assuring trustworthy evidence would not be served by suppressing a victim's voluntary testimony, under oath, as to his own independent recollection of the acts committed on them.

Therefore, it is submitted both the rationale underlying the Fifth Amendment and this Court's decisions demonstrate that the court below by focusing primarily on the deterrent prong of the attenuation analysis appropriate to

Fourth Amendment cases, improperly applied too broad an exclusionary principle to derivative evidence.

B. There Is No Evidence That The Police Exploited The Primary Illegality.

In United States v. Ceccolini, 435 U.S. 268 (1978), this court considered the application of the "fruit of the poisoness tree" doctrine enunciated in Wong Sun v. United States, 371 U.S. 471 (1963) to suppress testimony of a live witness whose identity was discovered as a result of a Fourth Amendment violation. Even, in Fourth Amendment cases where the deterrent effect of the application of the exclusionary rule is of primary importance, this court in Ceccolini has indicated that the rule must be invoked with the greatest reluctance when faced with suppression

of testimony of a live witness than with suppression of an inanimate object. It is submitted that the court below deviated from this court's guidance by focusing on an "attenuation" analysis rather than by focusing on the "independence", from the constitutional violation of the victims' recollection and knowledge of the criminal act committed upon them.

United States v. Crews, 445 U.S. 436 (1980) is instructive. In Crews, the defendants' initial detention constituted an arrest without probable cause in violation of the Fourth Amendment, the victims in-court identification, following a photographic and lineup identification which were products of the illegal arrest, was held to be also a product of the illegal

arrest. This Court reversed. The focus of the decision rested on the fact that the victims independent recollection of the defendant antedated the unlawful arrest and therefore was untainted by the constitutional violation. Here too, the victims, if permitted, would at trial testify as to what happened to them. The victims have knowledge of what transpired and the ability, subject to cross-examination, to reconstruct the defendants' prior criminal activity. Their knowledge in no way flows from the defendants statements to the police. The court below found that they were not told of the defendants' statements until <u>after</u> they related the circumstances of the defendant's sexual misconduct to their mother. Here, while the mother may not have been informed by her friend

of the misconduct, "but for" the improper police conduct[2/] the police did not "exploit" the improperly obtained information. The children's recollection of the events was independent of, and not influenced by the improperly obtained statements. Therefore, it is submitted that the proper and only test, if the fruit of the "poisoness tree doctrine" is applicable to victim testimony, is whether the victims testimony as to the events has a source independent of the illegality. See also Segura v. United States, 468 U.S. 796 (1984). The fact that the victims identity was unknown to the police prior to the improperly

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2/ There was in fact, testimony by the mother, that David asked her if Miriam had told her what the defendant did to him.

the police did not "exploit" the improperly obtained information. The children's recollection of the events was independent of, and not influenced by the improperly obtained statements. Therefore, it is submitted that the proper and only test, if the fruit of the "poisoness tree doctrine" is applicable to victim testimony, is whether the victims testimony as to the events has a source independent of the illegality. See also Segura v. United States, 468 U.S. 796 (1984). The fact that the victims identity was unknown to the police prior to the improperly obtained statement is irrelevant, where the police do not utilize that statements to induce the victims testimony, but the victim independently, no matter how coincidentally and

voluntarily comes forward. United States v. Houtin, 566 F.2d 1027, 1031 (5th Cir. 1978). As the majority of the court, in concurrence in Crews, explained

> "Assume that a person is arrested for crime X and that answers to questions put to him without Miranda warnings implicate him in crime Y for which he is later tried. The victim of crime Y identifies him in the courtroom; the identification has an independent, untainted basis. I would not Suppress such an identification on the grounds that the police had no reason to suspect the defendant of a crime prior to their illegal questioning and that it is only because of the questioning that he is present in the courtroom for trial. I would reach the same result whether or not his arrest for crime X was without probable cause or reasonable suspicion." White, J. with whom the Chief Justice and Mr. Justice Rehnquist join, concurring. at 476-477.[3/]

Similarly, the victims recollections are independent of the illegal questioning.

3/ Mr. Justice Powell and Mr. Justice Blackman also joined. Id. at 477.

To rule as did the court below is to put the police in a worse position than they would have been if the misconduct had not occurred. This result has been firmly rejected by this court. See Nix v. Williams, 467 U.S. 431, 443 (1984). To require the suppression of a victim's voluntary testimony as to what criminal acts have been committed on him, is, it is submitted, to turn any normal sense of justice on its head.

> "The proffer of a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. The fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory and volition interract to determine what testimony he will give. The uniqueness of this human process distinquishes the evidentiary character of a [living] witness from the relative immutability of inanimate evidence. Smith v. United States, 117 U.S. App. D.C. 1, 3-4, 324 F.2d 879, 881-882 (1963).

This reasoning is even more compelling when one contemplates prohibiting a victim from testifying - thus effectively barring a prosecution. Such a grant of amnesty has been firmly rejected by this Court. Kastigar, supra at 462.

CONCLUSION

For the reasons stated above the petition for writ of certiorari should be granted.

Respectfully submitted,

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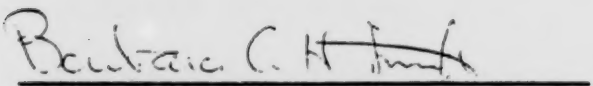

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Appendix A.

SUPREME JUDICIAL COURT

COMMONWEALTH v. RUSSELL M. LAHTI.

Norfolk. September 9, 1986-December 18, 1986.

A motion to suppress evidence was heard by Thomas E. Dwyer, J. An application for an interlocutory appeal was allowed in the Supreme Judicial Court for the county of Suffolk by Liacos, J., and the case was reported by him.

O'Connor, J. A grand jury returned five indictments charging the defendant with rape of a child and three indictments charging him with indecent assault and battery on a child under fourteen years of age. The indictments named two victims. The defendant moved to suppress the alleged victims'

testimony. A judge ruled that the victims' testimony constituted "fruit of the poisonous tree," see Wong Sun v. United States, 371 U.S. 471 (1963), and allowed the motion. A single justice of this court granted the Commonwealth's application for an interlocutory appeal and referred the case to the full court. We affirm.

The questions on appeal is whether the judge correctly concluded that the victims' anticipated testimony was tainted fruit of the defendant's involuntary statements to the police. Because the standards applicable under art. 12 of the Massachusetts Declaration of Rights have not been separately argued by the parties, we confine our review to the constitutional standards applicable under the Fifth Amendment to the United States Constitution.

The order from which the Commonwealth appeals, suppressing the victims' testimony, was preceded by the allowance by a different judge of the defendant's motion to suppress incriminating statements he had made to the police. The earlier motion, which we shall refer to as the first motion, was allowed on the ground that those statements were made involuntarily. The correctness of that ruling is not in issue. The first motion judge found that on March 22, 1985, the defendant met with detectives at the Quincy police station and discussed an incident of sexual abuse of children "for which he had been brought in." That incident did not involve the victims named in the present indictments. The detectives told the defendant that they had

information implicating him in other incidents of sexual abuse of children. They also told him that, if he cooperated with the investigation by waiving his right against self-incrimination and his right to have an attorney present at the questioning, his statements would not be used as the basis of criminal charges against him. In addition, they told him that, if he cooperated, they would recommend to the district attorney that he be included in a sexual offenders' diversion and treatment program rather than be prosecuted. Lastly, the detectives told the defendant that, if he were accepted into that program with-out having disclosed other sexual experiences he had had with children, there was a risk that the police would discovery those

incidents and he would be expelled from the program and prosecuted.

On the following day, March 23, 1985, the defendant telephoned one of the detectives and described several incidents involving the victims named in the present indictments. The judge found that the defendant's statements were induced by the detectives' promise of leniency and by the threat that a failure to confess everything would result in harsher treatment. He concluded that the promise and threat were a "calculated attempt to raise an expectation of leniency," that the statements were involuntary, and that their suppression was required. The Commonwealth did not appeal from the allowance of the defendant's motion to suppress his statements.

Thereafter, the defendant moved to suppress the testimony of the two children named as victims in the present indictments on the ground that their testimony would be the fruit of his involuntary statements and therefore inadmissible under Wong Sun v. United States, supra, and its progeny. We shall refer to this motion as the defendant's second motion. After a hearing, the second motion judge adopted the findings of the first motion judge, which procedure neither party challenges, and made additional findings. We set forth immediately below the relevant additional findings, quoting them in large measure.

The judge found as follows:

"1. The corpus delicti of the crime and the identity of the victims were not

known to the police until the defendant told them.

"2. As a result of the defendant's statements to the police, the mother of the children was indirectly informed that the defendant had confessed wrongdoing with her children.

"3. Having thus been informed by a third party, the mother then contacted the police department and was advised by the police that the defendant had made a statement involving sexual misconduct with her children. The police advised her to talk to the children about this, but cautioned that care should be taken in the manner in which the children were informed because the defendant had claimed that the children were asleep when the sexual acts took place . . . .

"4. The mother did question her children separately and in a guarded manner, not indicating that the defendant had admitted wrongdoing with them. Ultimately, the children did describe to their mother the sexual acts performed by the defendant on them and only then did the mother indicate that the defendant had admitted the story to the police.

"5. Within a day or two, the children went to the police station of their own free will and told their story to the police officer. The mother has expressed a willingness for the children to testify in the trial in the courtroom.

"6. The children would testify upon questioning that they told their mother of the assaults by the defendant and that she advised them that the defendant admitted the story to the police."

The judge further found that "[t]he Commonwealth clearly did not 'coerce' the children to testify. Their mother was first informed of the defendant's admissions, not by the police, but by her friend, the defendant's girlfriend. The mother then voluntarily called the police and followed their advice on the questioning her children in a guarded manner. . . . They later spoke voluntarily to the police. I find no State coercion in this chain of events." The judge concluded that the officers' "intervention . . . trigger[ed] a chain of events that would produce . . . victim/witness[es] willing to press charges and to testify against the defendant." The judge also concluded that the officers "must have realized" that that chain of events

would occur, and that the officers "deliberately and intentionally extracted the identities of these witnesses/victims from the defendant."

As we explain below, our decision in this case rests on the judge's findings that the police obtained the defendant's involuntary statement for the very purpose of obtaining information, previously unknown to them, of other crimes committed by the defendant and the identity of victims whose testimony might be used as proof, and that the effort of the police was successful. The evidence warranted those findings. The Commonwealth in its brief states that "there is no suggestion that the third party was prompted by any official to make [the] disclosure" to the alleged victims' mother about the assaults. If

that statement was meant to be an assertion that there was no evidence that the mother's friend was prompted by the police to tell the mother about the defendant's assaults against her children, we reject it. The judge clearly was warranted in finding that the police used promises and threats to stimulate the defendant to disclose crimes and victims' names for law enforcement purposes. As the judge observed, "[i]t was particularly shocking to learn from the officers' testimony that, although the defendant was encouraged to 'come clean' and to tell all, in fact, the longer a suspect has been involved in the sexual abuse of children, the less likely he is to be accepted into the program, and the more likely he is to be indicted" (emphasis

in original). The evidence disclosed that, promptly after the defendant told the police about his abuse of the victims, in keeping with the police objectives, the mother's friend notified the mother about the incidents to which the defendant had confessed, and advised her to call the police. The judge was justified in concluding that the chain of events was other than coincidental.

We turn to a discussion of the applicable Federal law. It is well established that the exclusionary rule applies not only to the direct results of police misconduct but also to the "fruits" of official illegality. See Wong Sun v. United States, supra at 484. This broad exclusionary rule follows from the fact that "[t]he essence of a provision forbidding the

acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). Equally well-established precepts qualify this sweeping exclusionary principle, however. Thus, evidence is admissible if the government learns of it from a source independent of the illegality, id., if the connection between the police misconduct and the discovery of the challenged evidence is "so attenuated as to dissipate the taint," Nardone v. United States, 308 U.S. 338, 341 (1939), or if the evidence would inevitably have been discovered in the normal course of a legal police investigation, Nix v. Williams, 467 U.S. 431 (1984).

From Wong Sun v. United States, supra at 485-488, we learn that not only may physical materials obtained during or as a direct result of an unlawful invasion of a defendant's Fourt Amendment rights be barred from evidence, but evidence of a visual and auditory observations made in such circumstances may be barred as well. The present case raises the question, not whether materials the government has acquired or observations its witnesses have made as a result of unlawful intrusion are admissible, but rather whether the testimony of a witness discovered through the involuntary statement of a defendant is admissible. Our question is whether, in the circumstances of this case, the connection between the involuntary

statement of March 23, 1985, and the acquisition of the witnesses' anticipated testimony is so attenuated that the exclusionary rule does not apply. The Commonwealth does not contend that the testimony is admissible because of the independent source or inevitable discovery qualifications of the exclusionary rule.

A similar question was presented to the Supreme Court in the case of United States v. Ceccolini, 435 U.S. 268 (1978), although as we shall see, there is a critical distinction between that case and this one. Ceccolini concerned that the testimony of a witness who was discovered as a result of an illegal search rather than, as here, an involuntary statement. However, we have not been made aware of a sufficient

reason why a different attenuation analysis should apply under the Fifth Amendment to testimony acquired through an involuntary statememt than applies under the Fourth Amendment to testimony acquired as a result of an illegal search. Indeed, the arguments of the parties are in large measure focused on the Ceccolini case and on the case of Commonwealth v. Caso, 377 Mass. 236 (1979), in which this court considered the admissibility of the testimony of a witness whose identity was disclosed to the police through an illegal wiretap.

In United States v. Ceccolini, supra, the witness's significance, although not her identity, was discovered as a result of an unlawful search of the defendant's shop by a police officer named Ronald Biro. After

being interviewed by the police, the witness testified against the defendant voluntarily. Nothing acquired by Officer Biro in the course of his search was used to obtain the witness's cooperation. Id. at 279. Furthermore, there was "not the slightest evidence to suggest that Biro entered the shop or picked up the envelope with the intent of finding [relevant] tangible evidence . . . , much less suggestion that he entered the shop and searched with the intent of finding a willing and knowledgeable witness to testify against respondent." Id. at 279-280. Given those facts, and in view of the balance to be struck between protecting constitutional rights by deterring official misconduct, on the one hand and, on the other hand, "encroach[ing]

upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth," id. at 275-276, the Court concluded that the exclusionary rule ought not apply to the witness's testimony. Id. at 280.

The Court in Ceccolini reasoned that the basic purpose of the exclusionary rule, deterrence of official misconduct, would not be served by application of the rule in the circumstances of that case. Although the Court considered several factors, two considerations were predominant in the Court's rationale. The first of these was the willingness of the witness to testify. The Court observed: "The greater the willingness of the witness to freely testify, the greater the likelihood that he or she

will be discovered by legal means and, concomitantly, the smaller the incentive to conduct an illegal search to discover the witness." Id. at 276. The Court's other predominant consideration was that "[a]pplication of the exclusionary rule . . . could not have the slightest deterrent effect on the behavior of an officer such as Biro [whose unlawful search was not made for the purpose of discovering evidence or the identity of a witness]. The cost of permanently silencing [the witness] is too great for an evenhanded system of law enforcement to bear in order to secure such a speculative and very likely negligible deterrent effect." Id. at 280.

The Court's reasoning in Ceccolini appears to contain the implicit assumption that, if an unlawfully discovered witness turns out to be

willing to testify, the police would have been able to predict at an earlier time that without police intervention the witness would not only testify voluntarily on request but would voluntarily come forward as well. The police, then, would not be motivated to engage in illegal activity for the specific purpose of discovering the witness and securing the witness's testimony. Deterrence of purposeful police misconduct thus would be unnecessary.1/

1/ Focusing on this part of the Court's reasoning in Ceccolini, Justice Marshall, with whom Justice Brennan joined, dissenting, said "The somewhat incredible premise . . . is that the police in fact refrain from illegal behavior in which they would otherwise engage because they know in advance both that a witness will be willing to testify and that he or she 'will be discovered by legal means.' [Id. at 276]. This reasoning surely reverses the normal sequence of events; the instances must be very few in which a witness' willingness to testify is known before he or she is discovered." Id. at 288.

We need not evaluate the Court's reasoning, because it is sufficient for our purposes that in the present case, despite having found that the witnesses, as things developed, were willing to testify, the judge also found on adequate evidence that the police obtained the defendant's involuntary statement for the very purpose of discovering the defendant's crimes and witnesses to testify to them. In this case, therefore, unlike in Ceccolini, and unlike in Commonwealth v. Caso, supra, where there was no suggestion that the illegal wiretap was designed to discover witnesses, the willingness of the witnesses to testify permits neither an inference nor an assumption that the police conduct was not purposeful. The purposeful conduct forcefully suggests

that the police did not think that the witnesses would come forward and testify voluntarily. In this case, therefore, legitimate concerns for deterrence compel the application of the exclusionary rule to the children's testimony.

As the Court in Ceccolini noted, "[o]f course, the analysis might be different where the search was conducted by the police for the specific purpose of discoverng potential witnesses." Id. at 276 n.4. We are persuaded that the attenuation analysis not only might be different but must be different in a case such as this, where the issue is the admissiblity of the expected testimony of witnesses whose identity the police purposefully discovered by taking an involuntary statement from the

defendant. "[S]urely the exclusionary rule should not be withheld as to the very kind of evidence which motivated the [taking of the statement]." W.R. LaFave, Search and Seizure §11.4 at 673 (1978). We hold that in this case the link between the defendant's involuntary statement and the children's expected testimony is so close that to permit the Commonwealth to use the testimony at a trial of the defendant would defeat the exlusionary rule's purpose to protect constituionally guaranteed rights and privileges. Therefore, we affirm the order suppressing the children's testimony.

So ordered.

Appendix B.

COMMONWEALTH OF MASSACHUSETTS.

NORFOLK, SS.

SUPERIOR COURT
INDICTMENT NOS.
082246 082247
082248 082292
082293 082294
082295 082296

COMMONWEALTH OF MASSACHUSETTS

v.

RUSSELL M. LAHTI

MEMORANDUM OF DECISION
AND ORDER ON DEFENDANT'S
MOTION TO SUPPRESS

I. BACKGROUND

The defendant in this action filed a Motion to Suppress certain incriminating statements. Defendant met with detectives at Quincy Police Department on March 22, 1985 and was advised that they had information implicating him in the sexual abuse of children. He was also advised that if he fully cooperated with the investigation, waiving his

right to have an attorney present at the questioning and waiving his right against self-incrimination, that his statements would not be used as the basis of criminal charges against him. Defendant was further told that if he cooperated, he would be recommended to the assistant district attorney for inclusion in a special program for diversion and treatment. The director of the program was present at defendant's interview. Defendant was informed that district attorney would have to make the trial decision and that if it were later discovered he had failed to admit any other sexual experiences with children he would risk being expelled from the program and reprosecuted. On the day of the interview, the defendant described the

initial incident for which he had been brought in. The following day, defendant contacted Detective Patricia Negrelli by telephone and described several other incidents of sexual conduct with other children. Defendant is now being prosecuted for one of the latter incidents.

II. DISCUSSION

We grant defendant's motion to suppress his statements on March 22 and on March 23 as having been obtained in violation of his rights against self-incrimination and to the assistance of counsel as guaranteed by the United States Constitution and the Declaration of Rights of the Commonwealth of Massachusetts.

The Supreme Court of the United States has long held that involuntary

confessions may not be used during a criminal trial. "[A]ny criminal trial use against a defendant of his involuntary statement is a denial of due process law, even though there is ample evidence aside from the confession to support the conviction." Mincey v. Arizona, 437 U.S. 385, 398 (1978), quoting Jackson v. Denno, 378 U.S. 368, 376 (1964) (emphasis in original). As a general rule, "what is prohibited is not a general statement about the value of cooperation but a promise that cooperation by the defendant will aid the defense or result in a lesser sentence being imposed." Commonwealth v. Williams, 388 Mass. 846, 855 (1983); Commonwealth v. Meehan, 377 Mass. 552, 563 (1979). With respect to promises, what is prohibited is an assurance,

express or implied, that a confession will aid the defense or result in a lower sentence. See Bram v. United States, 168 U.S. 532 (1897); Grades v. Holes, 398 F.2d 409 (4th Cir. 1968).

The voluntariness of defendant's two statements, those made at the police station and those made over the telephone the following day, must be considered separately. It is clear from a number of factors that his first statements in the stationhouse were made in reliance on the police's offer of leniency. Defendant was advised to waive his rights to an attorney and against self-incrimination. The police told him they had other inculpatory evidence. A highly credible possibility was held out to him that he could avoid jail by confessing all. Under these

circumstances, defendant's statements cannot be considered voluntary.

The various pressures brought to bear on defendant to "come clean" included a calculated attempt to raise an expectation of leniency. As the Supreme Court explained in Brady v. United States, 397 U.S. 742 (1970) "even a mild promise of leniency [is] sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess."

The presence of a third party, the director of the diversion program, hardly absolves the state of its responsibility in inducing a

confession. Defendant was foreseeably likely to believe in the availability and desirability of the diversion program where its proponent was physically present at the time defendant had to make his choice. The defendant's right of due process would, in some circumstances, "apply even though the statements were extracted by private coercion, unalloyed with any official government involvement." Commonwealth v. Mahnke, 368 Mass. 662, 679-680, cert. denied, 425 U.S. 959 (1976) (admission by defendant following abduction by "vigilantes"). See also Commonwealth v. Curtis, 388 Mass. 637 (1983) (confession not invalid where private party did not use extreme coercion and no clear casual connection between his urgings and defendant's statements). Here, in

contrast, even if the director of the program could be considered a private party, the State clearly intended to benefit from his presence as a means of eliciting further statements from defendant.

The voluntariness of defendant's second statement over the telephone must next be considered. A subsequent inculpatory statement was inferred to be the product of the prior confession in Commonwealth v. Meehan, 377 Mass. 552 (1979), where it was made a relatively short time after the confession and at the same place (the stationhouse); it was corroborative of the confession, there was no opportunity for consultation with family; and, although there had been a statement that the confession would help the defendant or

even free him in the end, there was no indication of confidence that would mark a 'break in time or the stream of events' sufficient to dissociate the statement from the confession (citing Mahnke). See Commonwealth v. Meehan, 377 Mass. 571. The Meehan court also ruled out the possibility that remorse was so far at work as to provide the break. Meehan at 571. "The burden was on the Commonwealth to show circumstances insulating the statement from the confession..." Id. Mahnke sets forth two guidelines to analyze the voluntariness of later statements when an initial confession is involuntary. First, 'the court must look for a 'break in the stream of events,' the coercive circumstances which extracted earlier statement, 'sufficient to insulate the

[subsequent] statement from the effect of all that went before.' Clewis v. Texas, 386 U.S. 707, 710 (1967). The focus of this line of analysis is on external constraints, continuing or new, which may have overborne the defendant's will. When circumstances no longer coerce the defendant, a break in the stream has occurred. The second line of analysis looks more specifically to the effect of the previous confession on the defendant's will. To be admissible, subsequent statements may not be 'merely the product of the erroneous impression that the cat was already out of the bag.' Darwin v. Connecticut, 391 U.S. 346, 351 (1968) ... because one coerced confession has let the secret 'out for good'. United States v. Bayer, 331 U.S. 532, 540 (1947)." Mahnke, 368 Mass. at 682-83.

The latter analysis "requires the exclusion of a statement if, in giving the statement, the defendant was motivated by the belief that, after a prior coerced statement, his effort to withhold further information would be futile and he had nothing to lose by repetition or amplification of the earlier statements." Mahnke, at 686. "In determining whether a defendant was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances -- both the characteristics of the accused and the details of the interrogation." Schneckloth v. Bustamante, 412 U.S. 218 (1973). Commonwealth v. Harris, 363 Mass. 888 (1973); Commonwealth v. Pratt, 360 Mass. 708 (1972).

Defendant's statements on the second day are suppressable under the first theory described. There was no break in the stream of coercive circumstances sufficient to justify a different treatment. Defendant was under the reasonable impression that he had been offerred leniency in return for his willingness to talk freely. He also had been warned that if he concealed additional circumstances of sexual abuse from the law enforcement officials, the lenient treatment would be withdrawn. It was these promises and threats, in addition to a mere fear of apprehension and authority, that induced defendant's cooperation at the stationhouse. While his fears of apprehension and authority could have lessened overnight, after he was released from that coercive

environment and allowed to go home, the promises and threats remained ingrained in his consciousness. Quite reasonably, when reflecting on his plight, he continued to reach out for the hope of leniency implanted in his mind and sought to secure it by admitting to other culpable acts, as he had been warned he must do. Although in his own home the physical constraints of interrogation may have diminished, the emotional environment induced by the threat of further punishment still bound him and overbore any will to avoid detection. Under the second line of analysis, defendant is also entitled to protection. His secret that he was a child molester was let out of the bag by the initial coerced confession. Although his initial confessions

described transactions with only one child, he could believe that the destruction of his reputation and self-esteem was well in hand. The further instances of abuse occurred with other children in the same household. Once he had acceded to accusations relating to one child, he could reasonably expect that denials of others would not be believed. We must look at defendant's subjective state of mind in these circumstances. His amplifications of how and when and with whom he had committed other sexual acts were integrally related in his mind to the initial admissions on the previous day. He could expect not only that withholding further information would be futile, but that it would harm his chance of rehabilitative treatment if it were subsequently discovered.

The Commonwealth must prove beyond a reasonable doubt that the statements were voluntary. Commonwealth v. Tavares, 385 Mass. 140, 152 (1982). "The Commonwealth bears a heavy burden of demonstrating voluntariness, evidence of which must affirmatively appear from the record. Every reasonable presumption against voluntariness will be indulged." Commonwealth v. Parham, 390 Mass. 833, 838 (1984). The Commonwealth has failed to carry its burden in this case and the statements will be suppressed. It should be noted that justice is to some extent served by the Commonwealth's knowledge that defendant is in fact responsible for other instances of abuse and by the opportunity to rehabilitate defendant through the diversion program.

Defendant's forth-rightness seems to indicate some sense of responsibility for his problem and his willingness to reveal it to those who might help him.

ORDER

It is therefore, Ordered that the defendants motion to suppress be granted.

Entered: October 16, 1985.

JOHN D. SHEEHAN
Justice of the
Superior Court

Appendix C.

COMMONWEALTH OF MASSACHUSETTS.

NORFOLK, SS.

SUPERIOR COURT
CRIMINAL ACTION
NOS. 82246,
82247 and 82248

COMMONWEALTH OF MASSACHUSETTS

v.

RUSSELL M. LAHTI

FINDINGS, RULINGS AND ORDER ON DEFENDANT'S MOTION TO SUPPRESS TESTIMONY OF VICTIMS AT TRIAL.

The defendant is charged with five counts of statutory rape and three counts of indecent assault and battery on two children, ages eight and eleven.

At an earlier date in the pretrial proceedings, the defendant had filed a motion to suppress a confession made by defendant to the police in which he volunteered the names of the victims involved here and admitted his misconduct with them. On October 16,

1985, a judge of the Superior Court, after hearing this motion, allowed the suppression of the defendant's statements on the grounds that they were obtained by the police in violation of the defendant's right against self-incrimination and his right to the assistance of counsel as guaranteed by the U.S. Constitution and the Declaration of Rights of the Commonwealth of Massachusetts. (Memorandum of Decision is attached hereto and incorporated herein.)

As an aftermath of that ruling, the defendant filed this motion seeking to suppress the testimony of the child victims to be offered at the trial. The grounds of that motion are that the children's testimony is the direct product of the illegality recognized by

the Court in its earlier ruling suppressing the defendant's statements. In essence, defendant argues that the victims' testimony is the "fruit of the poisonous tree" and is prohibited by Wong Sun v. United States, 371 U.S. 471 (1963) and its progeny. He reasons that the very identity of the victims came to the police's knowledge through the unlawful confession, and that, by virtue of the Court's ruling on the earlier motion to suppress, the Commonwealth should be precluded from offering the children's testimony in the trial on the indictments.

The defendant further argues that once the initial ruling is made that the evidence is tainted, then the burden shifts to the Commonwealth to prove either that the derivative evidence was

not obtained by exploitation of the initial illegality or, in the alternative, that the derivative evidence was obtained by means sufficiently distinguishable from the initial illegality so as to be purged of the taint. Defendant, therefore, argues that the burden is upon the Commonwealth to produce evidence which would establish (1) that the connection between the evidence (i.e., the children's testimony) and the illegal confession is so attenuated from the lapse of time or from other circumstances causing the taint to be dissipated, or (2) that the evidence was discovered through a source independent from the illegality.

The Commonwealth's contention is that the suppression of the defendant's

own statements should not preclude it from offering the children's testimony at trial. As reason therefor, the Commonwealth argues that the proferred testimony of the children came about as a result of a discussion with their mother and, hence, is not tainted by any earlier illegality.

After hearing, this Court finds and rules as follows:

1. The corpus delicti of the crime and the identity of the victims were not known to the police until the defendant told them.

2. As a result of the defendant's statements to the police, the mother of the children was indirectly informed that the defendant had confessed wrongdoing with her children.

3. Having thus been informed by a third party, the mother then contacted the police department and was advised by the police that the defenant had made a statement involving sexual misconduct with her children. The police advised her to talk to the children about this, but cautioned that care should be taken in the manner in which the children were informed because the defendant had claimed that the children were asleep when the sexual acts took place (although some misconduct allegedly occurred while the boy victim was in the shower with the defendant).

4. The mother did question her children separately and in a guarded manner, not indicating that the defendant had admitted wrongdoing with them. Ultimately, the children did

describe to their mother the sexual acts performed by the defendant on them and only then did the mother indicate that the defendant had admitted the story to the police.

5. Within a day or two, the children went to the police station of their own free will and told their story to the police officer. The mother has expressed a willingness for the children to testify in the trial in the courtroom.

6. The children would testify upon questioning that they told their mother of the assaults by the defendant and that she advised them that the defendant admitted the story to the police.

DISCUSSION

These facts require the Court to address two issues. The first is whether the defendant's confessions were

obtained illegally. The motion judge, Judge Sheehan, resolved this matter when he ruled on the defendant's motion to suppress the confessions themselves. The judge ruled that the defendant's admissions to the police of his sexual misconduct with the children were obtained in violation of his rights against self-incrimination and to the assistance of counsel as guaranteed by the United States Constitution and the Commonwealth's Declaration of Rights. Although this determination was made in the context of a prior motion, it applies equally well in this context, and so I adopt Judge Sheehan's decision on this issue and incorporate by reference his findings in support thereof. (Memorandum of Decision and Order on Defendant's Motion to Suppress, October 16, 1985.)

That finding of illegality poses a second issue for my consideration: whether the children's trial testimony against the defendant is so closely related to the illegal extraction of the defendant's admissions that the testimony must be excluded as "fruit of the poisonous tree." That rule, that evidence derived from other illegally secured evidence should be excluded as tainted with the primary illegality, was announced in Wong Sun v. United States, 371 U.S. 471 (1963). Wong Sun gave effect to the proposition that the essence of a provision of law forbidding the acquisition of evidence in an unlawful manner is not that the evidence so acquired shall not be used before the Court, but that it should not be used at all. On the other hand, the Wong Sun

Court also recognized that the connection between the lawless conduct of the police and the discovery of the challenged evidence can be "so attenuated as to dissipate the taint." Id. at 847, quoting Nardone v. United States, 308 U.S. 338, 341 (1939).

In United States v. Ceccolini, 435 U.S. 268 (1978), the Court addressed itself to the issue of when the connection between live-witness testimony and the illegal police conduct which led to the discovery of the witness becomes so attenuated as to dissipate the taint and to permit the use of that evidence against the defendant. The Court rejected a per se rule and opted, instead, for a balancing test in which several factors were considered. The Supreme Judicial Court,

in analyzing Ceccolini, enumerated five such factors in Commonwealth v. Caso, 377 Mass. 236, 280 (1979):

1. Whether the witness's testimony was an act of his or her own free will, in no way coerced or even induced by official authority;

2. Whether the illegally obtained evidence was used to secure the witness's cooperation;

3. The length of time between the commission of the illegality and the initial contact with the witness;

4. Whether the witness's identity was known to the authorities prior to the illegality; and

5. The deterrent effect of suppressing the witness's testimony.

The Court explicitly declined to assign fixed weights to these five factors, Ceccolini, supra, at 280; rather, the Court seems to have proffered these factors more as guidelines for analysis

than as a rigid and exhaustive list of considerations. See Caso, supra, at 242-243.

That having been said, however, the Court did enunciate some policy considerations which tend to stack the deck in favor of admitting the testimony. "The exclusionary rule should be invoked with much greater reluctance where the claim is based on a casual relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object." Ceccolini, supra, at 280. In Ceccolini, Justice Rehnquist had several reasons for ascribing favored status to live-witness testimony. Witnesses are more likely to come forward of their own

accord, and their testimony would often be produced even without the intervening illegality. Id. at 276-277. Furthermore, the disqualification of knowledgable witnesses from testifying at trial is a serious and historically disfavored obstruction to the ascertainment of truth, Id. at 277-278, and so "[t]he penalties visited upon the Government, and in turn upon the public, because its officers have violated the law, must bear some relation to the purposes which the law is to serve." Id. at 279. Therefore, unless the "extreme circumstances of a particular case require the suppression of the testimony as a deterrent to further resort to the unlawful conduct which resulted in the discovery of the witness," Caso, supra, at 241, the Court should not suppress the testimony.

Keeping these policy concerns in mind, this Court will apply the balancing test to the facts of this case, structuring its analysis around the five factors from Ceccolini. The first and primary factor focused upon in both Ceccolini and Caso was the degree to which the witness chose to testify of his or her own free will. The significance of this factor is that witnesses, unlike inanimate objects, often would come forward with testimony on their own. "The time, place, and manner of the initial questioning of the witness may be such that any statements are truly the product of detached reflection and a desire to be cooperative on the part of the witness." Ceccolini, supra, at 277. The analytic components of this factor

include the presence or absence of State coercion to testify and the likelihood that the witness would have been discovered by legal means. Id.

The Commonwealth clearly did not "coerce" the children to testify. Their mother was first informed of the defendant's admissions, not by the police, but by her friend, the defendant's girlfriend. The mother then voluntarily called the police and followed their advice on questioning her children in a guarded manner. Without first telling them of the defendants admissions, she placed certain open-ended questions to the children to which they each responded with statements that corroborated the defendant's testimony. They later spoke voluntarily to the police. I find no State coercion in this chain of events.

On the other hand, the police played a definite role in "inducing" the children's testimony. See Ceccolini, supra, at 279. Inducement is surely less offensive than coercion, but it ought not to be ignored. Prior to the extraction of the defendant's confession, the children had said nothing about the alleged abuse, and their silence probably would have continued on indefinitely, but for the illegally obtained confession which ultimately brought about the questioning by the mother. The officers must have realized, and certainly it is plain to this Court, that their intervention could and did trigger a chain of events that would produce a victim/witness willing to press charges and to testify against the defendant. I must conclude

that the children's testimony was and is freely offered, albeit facilitated greatly by the illegality.

The second factor from Ceccolini is whether the testimony obtained illegally from the defendant was used to secure the children's testimony. What I have to say here has already been said in the above discussion of freely given testimony and it need not be repeated in detail. Let it suffice to say that but for the confession, the police would not have been informed of the crime, and they would not have informed the mother (who herself would not have talked to the police), which brought about the questioning of the children. This appears to be a clear line of causation.

The third factor is the amount of time that passed between the illegality

and the initial contact with the witnesses. Significantly, both of those events occurred on the very same day. This emphasizes the predictability with which the defendant's confession, in the absence of a clear and reliable grant of immunity, would produce witnesses and legal action against him. The temporal and causal connection between the illegality and the witnesses is a very close one in this case.

The fourth factor, that the witnesses ' identities were unknown to the authorities prior to the illegality, operated strongly in the defendant's favor. Not only were the witnesses' identities unknown prior to the illegality but, given the nature of the offense, the police were also not likely later to obtain their identities by

independent lawful means. It bears emphasizing here that this is not a simple case where a rather technical illegality uncovers an obscure clue which later leads to the discovery of a witness. Here, the very substance of the primary illegality was the extraction under dubious interrogative circumstances of the witnesses'/victims' identities and of the existence of the crimes themselves. Apart from the defendant's admissions, no independent basis existed to suspect that these crimes had ever occurred. In neither Ceccolini nor Caso did the illegality itself consist of the identification of the witness, the crime, or the victim. Both of those cases involved intermediate discoveries. Defendant's case is further distinguished from

Ceccolini and Caso because in both of those cases, the witness whose testimony the defendant sought to suppress was a third party, not the victim himself.

In Ceccolini, Justice Rehnquist considered whether the officer who committed the illegality had intended, in committing the illegality, to find a willing and knowledgeable witness to testify. Ceccolini, supra, at 279-280. In the present case, the evidence in the previous paragraph and Judge Sheehan's findings show that the police deliberately and intentionally extracted the identities of these witnesses/victims from the defendant. In Caso, trial court judges were instructed to consider the closeness of the link between the police's misconduct and the testimony sought to be

suppressed. Caso, supra, at 241. Having examined that link, this Court cannot help but conclude that it is a very close one in this case.

This conclusion presses upon the Court that the final and very important factor: namely, whether the suppression of the witnesses' testimony would, in this case, deter further resort to the unlawful conduct which resulted in the discovery of the witnesses/victims. The Court must examine closely the primary illegality to determine whether it is the type of illegality which might recur and which would be deterred by suppression or whether it was a single, isolated, happenstance transgression.. Regarding the illegality, Judge Sheehan's findings were as follows. The police officers told the defendant that,

if he cooperated and waived both his right to have an attorney present and his privilege against self-incrimination, his statements would not be used as the basis of criminal charges against him. Instead, they would recommend him for their Sexual Diversion Program; but if the District Attorney were later to discovery that the defendant had failed to disclose any instances of abuse, he might be expelled from the program and reprosecuted. See Memorandum of Decision, supra p. 4, at 1-2. The defendant then confessed to several incidents of sexual abuse of the children; and the Commonwealth, in bringing these indictments, violated its promise. This the law will not countenance.

Judge Sheehan found that "[i]t was

these promises and threats, in addition to a mere fear of apprehension and authority, that induced defendant's cooperation." Id. at 7. The judge concluded that the defendant's statements could not be considered voluntary under these circumstances. Judge Sheehan's legal basis was the relatively early case of Bram v. United States, 168 U.S. 532 (1897), in which the Court held that the admissibility of a confession depended on whether it was "free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." Id. at 542-543 (emphasis added), quoted in Brady v. United States, 397 U.S. 742, 753 (1970).

"[E]ven a mild promise of leniency is sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess." Id. at 754.

Judge Sheehan found that the use of the diversion program in the context of this interrogation was a "calculated attempt" to raise an expectation of leniency. Memorandum of Decision, supra p. 4, at 3-4. To be sure, the possibly coercive impact of a promise of leniency can be dissipated by the presence and advice of counsel and by other safeguards. Brady, supra, at 754. In this case however, no counsel was present, and defendant was subject to

such a confusing barrage of promises and information about the program that it is not difficult to find that his will was unfairly overcome by the inducement. Even the testimony of the three officers present at the interrogation is not all in agreement as to exactly what the defendant was told and promised about the program. (See generally, Transcript of Hearing on Motion to Suppress, September 10, 1985, of which the Court has taken judicial notice, and which is on file with the papers in this case.)

I wish, finally, to emphasize the systemic nature of this illegality, the fact that it seems to be a standard operating procedure of the ongoing, county-wide Sexual Diversion Program. This illegalilty was not a one-time-only

incident; rather, it was a "calculated effort" which can recur everytime a multiple offense child-abuse suspect is considered for admittance into the diversion program. The illegality is designed and structured to reveal the victim's/witness's identity every time it occurs. I deem these particular factors to be "extreme circumstances" of such weight as to override the witnesses' voluntary decisions to testify, requiring the suppression of this testimony "as a deterrent to further resort to the unlawful conduct which resulted in the discovery of the witness[es]." Caso, supra, at 241. The systemic and recurrent nature of this illegality makes deterrence through suppression an appropriate and fully warranted response.

This opinion should not be construed as condemning the Sexual Diversion Program itself, nor as requiring the complete sacrifice of that program to the defendant's Fifth Amendment rights. Both can coexist, but the program must be tailored so as not to infringe on the Fifth and Sixth Amendment rights of those interrogated as candidates for that program. As the Brady decision suggested, the presence of an attorney or of other safeguards can help overcome the coercive taint of the interrogative procedures used in this instance. See Brady, supra, at 754. If the suspect and his counsel were given a clear statement of defendant's rights under the program, especially of his criminal liabilities and of the possible uses of his admissions against him, that would

be an entirely different case. It was particularly shocking to learn from the officers' testimony that, although the defendant was encouraged to "come clean" and to tell all, in fact, the longer a suspect has been involved in the sexual abuse of children, the less likely he is to be accepted into the program, and the more likely he is to be indicted. (Transcript of Hearing, supra p. 12, at 54.) Therefore, those with the greatest burden and motivations to confess are the least likely (in fact, they are very unlikely) to benefit from doing so. It seems taht this was not made known to the defendant before he was induced to confess his offenses.

I do not hold that the Government's failure to exercise procedural care for the rights of the defendant was done in

bad faith. More likely, it was a problem of negligence in procedural design. But even if it was designed negligently, it was carried out deliberately. This decision to suppress hopes to instill a greater degree of care toward the rights of the defendants and suspects brought into contact with the Sexual Diversion Program. The exclusion of the defendant's statements, as ordered by Judge Sheehan, is not enough to deter the outrageous conduct of the police because the substance of their illegality was that in exchange for the defendant's confession, no prosecution would be instituted. Once this illegality was established, the burden fell upon the Commonwealth to show that its connection to the challenged testimony is so attenuated as

to be harmless, and under the facts here, the Commonwealth has not discharged that burden.

ORDER

It is hereby ORDERED that defendants Motion to Suppress the testimony of the victims be Granted.

Dated: January 22, 1986

THOMAS E. DWYER
Justice of the
Superior Court